The House Committee on Government Reform Investigation of the FBI's Use of Confidential Informants

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In early 2001, the House Committee on Government Reform initiated an investigation of corruption in the Boston Regional Office of the Federal Bureau of Investigation (FBI) related to the use of confidential informants. As noted by the Department of Justice (DOJ) Office of the Inspector General (OIG), "[i]nformants have become integral to the success of many FBI investigations of organized crime, public corruption, the drug trade, counterterrorism, and other initiatives."[2] While the committee's investigation spanned decades of FBI practices, it focused particularly on the use of alleged murderers as informants in the Boston Regional Office, including notorious figure James "Whitey" Bulger. The committee deemed the affair to be "one of the greatest failures in federal law enforcement history."[3]

A. Investigation Background and the Committee's Findings

The FBI's informant program goes back to the J. Edgar Hoover days, beginning with the establishment in 1961 of the Top Echelon Criminal Information Program (Top Echelon), in which special agents in charge were instructed to "develop particularly qualified, live sources within the upper echelon" of organized crime.[4] The program was later replaced with the Criminal Informant Program. In addition to the informants program, the FBI utilized electronic surveillance devices to capture recordings of conversations between organized crime leaders, including informants. For example, in 1962, the FBI placed electronic surveillance devices in the headquarters of organized crime leader Raymond Patriarca. In the next years, the FBI attempted to court both Vincent James "Jimmy" Flemmi and Stephen Flemmi to be Top Echelon informants. The Flemmi brothers were heavily involved in organized crime in Boston.

Through its electronic surveillance, the FBI knew that Jimmy Flemmi and another gang member, Joseph Barboza, asked Patriarca for permission to kill Edward "Teddy" Deegan. Following the murder, an FBI agent also learned from a different informant that Jimmy Flemmi had admitted to being one of the killers. Despite this knowledge, the FBI continued to develop Flemmi as an informant. Six men were tried for Deegan's murder. Following an arrest on an unrelated weapons charge, Barboza was developed, with the assistance of Stephen Flemmi, as a cooperative witness for the trial. However, he informed FBI agents that "he would not provide information that would allow Jimmy Flemmi to 'fry,'" suggesting that he would provide false testimony to protect one of the guilty parties.[5] It appears as though nothing was done to prevent his

1. Legislative attorney, Congressional Research Service, Library of Congress. The views expressed herein are those of the author and are not those of the Congressional Research Service or the Library of Congress.

2. U.S. Dep't of Justice, Off. of the Inspector General, The Federal Bureau of Investigation's Compliance with the Attorney General's Investigative Guidelines 65 (Sept. 2005), https://oig.justice.gov/special/0509/final.pef [hereinafter 2005 OIG Report].

3. H. Comm. Gov. Reform, Everything Secret Degenerates: The FBI's Use of Murderers as Informants, 1 H.R. Rep. No. 108-414 (2003), at 10.

4. 2005 OIG Report, *supra* note 2, at 64-65.

5. 1 H.R. Rep. No. 108-414 (2003), at 3.

false testimony and the prosecution was not advised on the limitations of his testimony.[6] That testimony was contradicted by evidence in the FBI's possession, including evidence culled from the FBI's electronic surveillance.[7] None of this evidence was furnished to the prosecution or defendants. All six defendants were convicted. The committee determined that four of those individuals "did not commit the crime for which they were convicted."[8] Following the exposure of the withheld evidence decades later, the original prosecutor declared that he would not have indicted the defendants if he had the same information as the FBI.[9] Barboza went on to be the first participant in the Witness Protection Program.[10] During his stint in witness protection, "affirmative steps were taken [by the FBI] to help him escape the consequences of a murder he committed in California."[11]

Despite knowledge of his involvement in the Deegan murder, Jimmy Flemmi was taken on as a Top Echelon informant.[12] Hoover himself was informed of Jimmy Flemmi's status as an informant and the fact that he had likely committed seven murders.[13] The FBI determined that "'he is going to continue to commit murder[,]' but 'the informant's potential outweighs the risk involved.'"[14] The committee concluded that "there was no evidence that anyone expressed concern that Jimmy Flemmi would kill people while serving as a government informant."[15] Jimmy was later dropped as an informant after being charged by state authorities with assault with a dangerous weapon with the intent to murder. The FBI decided that given his status as a fugitive, "any contacts with him might prove to be difficult and embarrassing."[16]

However, his brother Stephen Flemmi continued to serve as an informant for decades to come. Stephen and Whitey Bulger were leaders of Boston's "Winter Hill Gang."[17] Bulger was developed as an informant by Special Agent John Connolly, who then developed an "improper relationship" with Bulger and other informants.[18] Bulger and Flemmi were allegedly shielded from prosecution for a number of serious violent crimes in exchange for their cooperation in collecting evidence against La Cosa Nostra in Boston.[19] The committee concluded that the evidence it reviewed "leaves no doubt that at least some law enforcement personnel… were well aware that federal informants were committing murders," including 19 murders allegedly committed by Bulger and Flemmi while they were informants.[20] Special Agent Connolly was convicted of obstruction of justice, in part for tipping off Bulger to a forthcoming indictment, which allowed him to escape and remain on the lam for 16 years. Bulger was finally captured in Santa Monica, California, in 2011.[21] Connolly was also accused of leaking confidential law enforcement information to his informants that led to the murders of three witnesses.[22]

In sum, the committee determined that the FBI knowingly used murderers as informants and then took actions to protect those informants despite their involvement in future criminal activity. It allegedly consciously chose not to prosecute these informants to protect their relationship. It also reportedly frustrated the efforts of other law enforcement agencies to hold these informants accountable for their actions. The committee determined that criminal investigations in at least

6. *Id*.

7. *Id*.

8. *Id.* at 2.

9. *Id.* at 4.

10. *Id*. at 13.

11. *Id.* at 4.

12. *Id*. at 5.

13. *Id*. at 16.

14. *Id*. (citing Memorandum from Special Agent in Charge, Boston FBI Field Office, to J. Edgar Hoover, Director, FBI (June 9, 1965) (Exhibit 102)).

15. *Id.* at 5

16. *Id.* at 17 (citing Memorandum from Special Agent in Charge, Boston FBI Field Office, to J. Edgar Hoover, Director, FBI (Sept. 15, 1965) (Exhibit 109)).

17. *Id.* at 89.

18. *Id*. at 2.

19. 2005 OIG Report, *supra* note 2, at 71.

20. H.R. Rep. No. 108-414 (2003), at 2, 5.

21. *Id.* at 109; Adam Nagourney, *Whitey Bulger is Arrested in California*, N.Y. Times, June 23, 2011, http://www.nytimes.com/2011/06/23/us/23bulger.html?_r=0.

22. Fox Butterfield, *Trial Ending for Boston F.B.I. Agent Accused of Mob Ties*, N.Y. Times, May 24, 2002, http://www.nytimes.com/2002/05/24/us/trial-ending-for-boston-fbi-agent-accused-of-mob-ties.html.

seven states "were frustrated or compromised" by federal law enforcement officials in order to protect informants.[23] The committee concluded that its "investigation make[s] clear that the FBI must improve management of its informant programs to ensure that agents are not corrupted."[24]

B. The Committee's Investigation and the Obstacles It Faced: 2001-2004

While the committee was ultimately able to uncover a wealth of information about the dysfunction within the Boston Regional Office and the general lack of FBI oversight of its informant program, its investigation encountered several roadblocks along the way. The committee described the FBI's involvement in the investigation as "more adversarial than collegial"[25] and repeatedly encountered an "institutional reluctance to accept oversight."[26] The committee requested tapes and documents related to the electronic surveillance of Patriarca, U.S. attorney records on the Deegan murder, and other categories of relevant documents. While DOJ responded to these document requests and assured the committee on multiple occasions that all responsive documents had been provided, throughout its investigation the committee discovered other responsive documents within DOJ's possession that were not disclosed.[27] The committee later summarized the investigation:

> Executive privilege was claimed over certain documents, redactions were used in such a way that it was difficult to understand the significance of information, and some categories of documents that should have been turned over to Congress were withheld. Indeed, the Committee was left with the general sense that the specter of a subpoena or the threat of compelled testimony was necessary to make any progress at all.[28]

The committee resorted to issuing a subpoena on September 6, 2001, for prosecution and declination memoranda authored by DOJ related to confidential informants.[29] Those documents, "averaging twenty-two years in age, would show the extent to which the prosecuting attorneys in the Justice Department knew of the FBI's relationship with the informants."[30] DOJ "made it clear" that it would not comply with the subpoena and provide the requested documents.[31] DOJ and White House officials objected to providing the committee with deliberative, prosecutorial documents. The committee scheduled a hearing for September 13, 2001, in which it hoped DOJ would explain its position on noncompliance.[32] However, the hearing and the investigation generally were put on hold for several months following the terrorist attacks on September 11, 2001.

When the committee returned to its investigation in December 2001, President George W. Bush formally invoked executive privilege, for the first time in his presidency, and instructed DOJ not to comply with the outstanding subpoena.[33] The documents withheld were described by a DOJ official at a committee hearing as a "small group of documents, namely, internal deliberative memoranda, which outline the specific advice to the decisionmakers by the line attorneys who handle the cases. We have also declined to provide memoranda that reveal confidential advice to the Attorney General or other high ranking Department officials on particular criminal matters."[34] The president's letter to the attorney general concluded that disclosure to the committee would be "inconsistent with the constitutional doctrine of separation of powers

23. 1 H.R. Rep. No. 108-414 (2003), at 5.

24. *Id.* at 2.

25. *Id.* at 125

26. *Id.* at 126.

27. *Id.* at 126-128.

28. *Id.* at 126.

29. *Id.* at 129.

30. Charles Tiefer, *"The Law": President Bush's First Executive Privilege Claim: The FBI/Boston Investigation*, 31 Presidential Studies Quarterly 201, 202 (2003).

31. 1 H.R. Rep. No. 108-414 (2003), at 129.

32. *Id.* at 130.

33. *Id.*

34. 1 *Investigation into Allegations of Justice Department Misconduct in New England: Hearings before the H. Comm. on Gov't Reform*, 107th Cong. 380 (2001) [hereinafter *1 New England Hearings*].

and the department's law enforcement responsibilities…"[35] The president further argued that

> [d]isclosure to Congress of confidential advice to the Attorney General regarding… confidential recommendations to Department of Justice officials regarding whether to bring criminal charges would inhibit the candor necessary to the effectiveness of the deliberative processes by which the Department makes prosecutorial decisions. Moreover, I am concerned that congressional access to prosecutorial decisionmaking documents of this kind threatens to politicize the criminal justice process.[36]

In its December 2001 hearing, DOJ officials argued that the assertion of executive privilege and its general refusal to provide these prosecutorial memoranda were "consistent with longstanding Department policy…"[37] White House Counsel Gonzales elaborated on this policy in a January 2002 letter, stating:

> Absent unusual circumstances, the Executive Branch has traditionally protected those highly sensitive deliberative documents against public or congressional disclosure. This traditional Executive Branch practice is based on the compelling need to protect both the candor of the deliberative processes by which the Department of Justice decides to prosecute individuals and the privacy interests and reputations of uncharged individuals named in such documents.[38]

Apparently the executive branch did not believe that the committee's investigation qualified as "unusual circumstances." During testimony, a DOJ official argued that the agency's willingness to provide the committee with information about its *final* prosecutorial decisions allowed Congress to carry out its constitutional responsibilities, insinuating that the deliberative process was unnecessary to the inquiry.[39]

The committee strenuously disagreed with the portrayal of the history of production of sensitive law enforcement documents to congressional committees.[40] It held a hearing in February 2002 for the purpose of demonstrating the persistent history of DOJ providing similar deliberative documents to Congress as part of its oversight duties. DOJ notified the committee before the hearing that it could not furnish a catalog of all instances in which deliberative documents had been disclosed to Congress, conceding, at least in part, that the department's aforementioned historical practice was not uniformly applied throughout the years.[41] Experts testified to over 30 instances since 1920 in which DOJ disclosed these kinds of materials, including in such investigations as ABSCAM,[42] in which the investigation committee "received the full details, the verbatim words of the prosecutorial memoranda," and an investigation into the decision not to prosecute President Jimmy Carter's brother Billy, in which DOJ disclosed prosecution memoranda and the committee interviewed line attorneys involved in the decision-making.[43]

The stalemate between the committee and DOJ broke shortly after this hearing. The committee announced a forthcoming hearing in which it would receive testimony from Judge Edward Harrington, who formerly worked at DOJ. Following the announcement of Judge Harrington as a witness, DOJ notified the committee that he had authored a memorandum related to the Deegan murder case, one of 10 prosecutorial memoranda being withheld.[44] During the course of DOJ's investigation of confidential informants, it interviewed Judge Harrington and showed this memorandum to him but

35. Memorandum on the Congressional Subpoena for Executive Branch Documents, 2001 Pub. Papers 1509 (Dec. 12, 2001) [hereinafter Subpoena Memorandum], https://www.gpo.gov/fdsys/pkg/WCPD-2001-12-17/html/WCPD-2001-12-17-Pg1783.htm.

36. *Id.*

37. 1 H.R. Rep. No. 108-414 (2003), at 131; *1 New England Hearings*, *supra* note 34, at 380.

38. 1 H.R. Rep. No. 108-414 (2003), at 131.

39. *1 New England Hearings*, *supra* note 34, at 381.

40. 1 H.R. Rep. No. 108-414 (2003), at 131-32.

41. *Id.* at 132.

42. The Senate established a select committee to investigate ABSCAM, an FBI sting operation related to public corruption that resulted in the convictions of one senator and six members of the House of Representatives. The committee focused its investigation on the FBI's undercover law enforcement activities. *See* Final Rept. of the S. Select Comm. to Study Undercover Activities of Components of the Department of Justice, S. Rep. No. 97-682 (1982).

43. *1 New England Hearings*, *supra* note 34, at 520-21; *see also id.* at 562-65.

44. 1 H.R. Rep. No. 108-414 (2003), at 132-33.

continued to refuse to produce it to the committee.[45] The chairman wrote to DOJ once again demanding access to this document and the nine other withheld memoranda, noting that DOJ had admitted the importance of the Harrington memorandum by disclosing its existence to the committee.[46] The chairman then criticized the agency for not admitting that the other nine documents likely held information similarly relevant to the investigation.[47] Following this demand, DOJ agreed to provide the Harrington memorandum to the committee before his scheduled testimony. DOJ justified this disclosure by claiming the committee had "demonstrated a particular and critical need for access to the one Harrington memorandum sufficient to satisfy constitutional standards" for disclosure.[48] Both in its hearings and final report, the committee expressed confusion and disbelief as to how its letter demanding the Harrington memorandum communicated a new particularized need not present when the document was subpoenaed earlier in the investigation.[49]

Following this disclosure, in committee testimony on February 14 a DOJ official offered to meet with the committee regarding its interest in the remaining nine withheld memoranda, but continued to defend DOJ's use of the Harrington memorandum in its internal investigation and refusal to disclose it promptly to Congress.[50] In response, the committee chairman threatened to schedule a bipartisan vote to hold the administration in contempt of Congress for its refusal to cooperate expeditiously with demands for the memoranda.[51] On February 26, 2002, committee staff met with then Assistant Attorney General Michael Chertoff to discuss these memoranda.[52] He described their contents and staff determined that five of the nine documents were relevant to the committee's investigation. Chertoff then "agreed to provide the Committee with access to the remaining five memoranda."[53] These documents provided additional information to the committee on the Deegan murder prosecution and the prosecutors' evaluation of the legitimacy of Barboza as a witness. A 1978 memorandum provided "extremely important information about how prosecutorial discretion was exercised to benefit FBI informants" Bulger and Stephen Flemmi.[54] This information called into question a 1997 DOJ Office of Professional Responsibility investigation of the use of informants, which concluded that DOJ had not exercised prosecutorial discretion on behalf of Bulger or Flemmi.[55]

C. The Legal Basis for the Assertion of Executive Privilege

It is notable that the disagreement between the committee and DOJ on the propriety of disclosing these prosecutorial memoranda centered on debates over DOJ's historical policy and specific instances in which similar documents had been disclosed. By focusing on these historical practices, the confrontation underscored the then lack of available case law to assist in assessing the validity of an executive privilege claim in the congressional oversight context. Since the committee's investigation ended in 2004, lower federal courts have decided two cases that shed additional light on the validity of the executive privilege claim that the administration eventually abandoned in the informant investigation.[56]

In 2008, the U.S. District Court for the District of Columbia ruled on another executive privilege claim of the Bush administration in *Committee on the Judiciary v. Miers*. That case arose from a congressional investigation of the removal of a number of U.S. attorneys. The House Judiciary Committee sought testimony and documents regarding the White House's

45. 2 *Investigation into Allegations of Justice Department Misconduct in New England: Hearings before the H. Comm. on Gov't Reform*, 107th Cong. 160-1 (2001) [hereinafter 2 *New England Hearings*].

46. *Id.* at 133.

47. *Id.*

48. *Id.*

49. *Id.* at 159-60.

50. *Id.* at 158.

51. *Id.* at 161, 660.

52. *Id.* at 134.

53. *Id.*

54. *Id.* at 135.

55. *Id.*

56. Committee on the Judiciary v. Miers, 558 F. Supp. 2d 53 (2008); Memorandum Opinion and Order, Committee on Oversight and Gov't Reform v. Lynch, No. 12-1332 (D.D.C. filed Jan. 19, 2016), https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2012cv1332-117 [hereinafter *Lynch* Merits Opinion]. Prior to the confirmation of Loretta Lynch as attorney general in 2015, this case was styled as *Committee on Oversight and Government Reform v. Holder*.

involvement in the removal decision to determine whether improper political considerations motivated the move.[57] The White House initially offered to make certain officials available for testimony, but testimony would be limited in scope to discussions between the White House and third parties (i.e. not internal White House deliberations) and could not be recorded or transcribed.[58] The committee rejected this accommodation as insufficient and ultimately issued subpoenas to Harriet Miers, the former White House counsel, for testimony and documents, and Joshua Bolten, the White House chief of staff, for documents.[59] In response, President Bush asserted executive privilege.[60] In the ensuing civil case, the Bush administration argued that close presidential advisers, like Miers and Bolten, were absolutely immune from congressional compulsory process when executive privilege was asserted.[61]

The *Miers* court rejected the executive's argument and concluded that "the asserted absolute immunity claim here is entirely unsupported by existing case law."[62] Since executive privilege was not an absolute privilege, an executive official could not simply refuse to comply with a subpoena by, for example, refusing to appear before a committee to provide testimony.[63] Instead, the privilege could be asserted on a question-by-question basis rather than in a blanket fashion. Furthermore, given the qualified nature of the privilege, it could be overcome by a sufficient showing of need by a committee.[64]

The case represented a victory for Congress in the court's rejection of the argument that executive privilege was an absolute privilege. However, the court also imposed a potential limitation on Congress's ability to force compliance with a subpoena. Without much explanation, the court suggested that presidential advisors may enjoy absolute immunity when "national security or foreign affairs form the basis for the Executive's assertion of privilege."[65] Nevertheless, it would appear that this case could have bolstered the committee's response to DOJ's recalcitrance during the course of the informant investigation. DOJ made repeated claims about the need to preserve both executive branch decision-making, untainted by the potential chilling effect of concerns over congressional disclosure, and the separation of powers generally in defense of its refusal to provide the requested documents.[66] However, it seems unlikely that it could have argued that the protection of decades-old prosecutorial memoranda regarding domestic organized crime players was a matter of national security. Therefore, at the most, DOJ's privilege would have been qualified and could have been overcome by a sufficient showing of need. Despite the potential limitation on Congress's powers of compulsion, the national security/foreign affairs exception has not been further litigated.

While *Miers* may be appropriately recorded in Congress's victory column, the other recent case involving an assertion of executive privilege might be more accurately described as a problematic draw. In *Committee on Oversight and Government Reform v. Lynch*, the U.S. District Court for the District of Columbia again confronted a question of executive privilege in a congressional investigation.[67] This case arose from a committee investigation of Operation Fast and Furious, an ill-fated "gun-walking" operation led by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), a subagency of DOJ.[68] At the outset of the investigation, DOJ sent a letter to the committee denying that the ATF had knowledge that the operation involved sales of assault weapons to straw purchasers, who then transported the firearms to Mexico.[69] Ten months later, DOJ retracted this letter, at which point the committee's investigation shifted to determining how and

57. *See generally* H.R. Rep. No. 110-423 (2007).

58. *Miers*, 558 F. Supp. 2d at 60.

59. H.R. Rep. No. 110-423, at 4-6.

60. Letter from Fred Fielding, counsel to the president, to Chairman Leahy and Chairman Conyers (June 28, 2007), https://georgewbush-whitehouse.archives.gov/news/releases/2007/06/20070628-2.html.

61. *Miers*, 558 F. Supp. 2d at 56.

62. *Id.* at 99.

63. *Id.* at 102.

64. *Id.* at 106.

65. *Id.*

66. *See* Subpoena Memorandum, *supra* note 35.

67. *See generally Lynch* Merits Opinion, *supra* note 56.

68. *See* H.R. Rep. No. 112-546 (2012).

69. Staff of H. Comm. on Oversight and Gov't Reform and S. Comm. on the Judiciary, 112th Cong., Fast and Furious: The Anatomy of a Failed Operation (Part I of III) 139 (2012).

why DOJ had provided false information to the committee.[70] The committee issued subpoenas for documents created after the retracted letter was submitted and related to DOJ's response to the committee's investigation.[71] The attorney general refused to turn over certain documents and the president formally asserted executive privilege several months later, on the eve of a contempt vote in the committee.[72] The executive branch put forth the same arguments here as it had in the informant investigation: Compelled disclosure of deliberative DOJ documents "would inhibit the candor of such Executive Branch deliberations in the future" and "would be inconsistent with the separation of powers established in the Constitution."[73]

The committee filed a civil suit to enforce the subpoena.[74] One of the central issues in the case was whether the president could rely on a deliberative process executive privilege assertion to withhold documents subject to a subpoena. The D.C. Circuit previously addressed different dimensions of executive privilege in the 1997 case *In re Sealed Case (Espy)*, arising in the context of a grand jury subpoena.[75] There, the court drew a distinction between two different kinds of executive privilege: the deliberative process privilege and the presidential communications privilege. The court characterized deliberative process as a common law privilege, which required a lower threshold of need to overcome and may "disappear[] altogether" when government misconduct has occurred.[76] *Lynch* was the first case to directly address the validity of a deliberative process privilege claim in a congressional investigation. The committee argued, based on language in *Espy*, that the deliberative process privilege is a wholly common law privilege and must be distinguished from other constitutionally based executive privilege assertions.[77] Given the committee's constitutionally based oversight authority, it contended that DOJ could not rely on the deliberative process privilege as grounds for withholding subpoenaed documents.[78] In contrast, DOJ argued that the deliberative process privilege is derived from the Constitution and, therefore, was a valid rationale for withholding documents that were subject to a congressional subpoena.[79]

The court rejected the committee's characterization of the privilege. It "determined that there is an important constitutional dimension to the deliberative process aspect of the executive privilege, and that the privilege could be properly invoked in response to a legislative demand."[80] *Lynch* was the first court to specifically rule that the deliberative process privilege could be validly asserted in the face of a congressional subpoena. While ultimately the *Lynch* court ordered DOJ to provide all of the withheld documents at issue in the complaint to the committee,[81] the case could be accurately described as one in which Congress won the battle and lost the war. The court's conclusion that the deliberative process privilege has constitutional roots bolsters the legitimacy of the executive branch's historical practice of asserting the privilege in response to congressional subpoenas. Federal case law now exists to dispute a committee's claim that deliberative process cannot be used as a shield against a subpoena.

This post-investigation case law demonstrates the danger of looking to the federal courts for resolution of these disputes. While committees have been successful at gaining court orders to compel the production of specific documents, the establishment of court precedent can also diminish Congress's power and leverage in future negotiations with the executive branch.

70. Letter from Deputy Attorney General James Cole to Chairman Darrell Issa and Ranking Member Charles Grassley (December 2, 2011), http://oversight.house.gov/wp-content/uploads/2012/06/Feb-4-Dec-2-letters.pdf.

71. H.R. Rep. No. 112-546, at 14-21.

72. Letter from Deputy Attorney General James Cole to Chairman Darrell Issa (June 20, 2012), http://oversight.house.gov/wp-content/uploads/2012/08/June-20-2012-Letter-from-Deputy-Attorney-General-Cole-to-Rep.-Darrell-Issa-with-attachment.pdf.

73. *Id.*

74. H.R. Res. 706, 112th Cong. (2012).

75. In re Sealed Case (Espy), 121 F.3d 729 (D.C. Cir. 1997).

76. *Id.* at 746.

77. Plaintiff's Motion for Summary Judgment, Committee on Oversight and Gov't Reform v. Lynch, No. 12-1332 at 25-33 (D.D.C. filed Dec. 16, 2013).

78. *Id.*

79. Memorandum in Support of Defendant's Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment, Committee on Oversight and Gov't Reform v. Lynch, No. 12-1332 at 18-32 (D.D.C. filed Jan. 21, 2014).

80. Order [on Plaintiff's Motion for Summary Judgment], Committee on Oversight and Gov't Reform v. Lynch, No. 12-1332 at 3 (D.D.C. filed Aug. 20, 2014).

81. *See Lynch* Merits Opinion, *supra* note 56, at 32.

D. Concluding Thoughts

The committee's continued pressure and pursuit of the documents withheld by DOJ during the confidential informants investigation resulted in a win for the committee: voluntary disclosure of the withheld documents. It is possible that the committee chairman's public threat to hold the administration in contempt of Congress, and the likelihood that such a vote could receive bipartisan support and pass, tipped the scales in favor of DOJ's ultimate disclosure.[82] It is not clear that such a committee strategy would result in the same disclosure if it were executed today. Recent high-profile confrontations between executive branch agencies and congressional committees have not always ended with such negotiation and accommodation, and the threat of a contempt vote may no longer be much of a threat at all. The Operation Fast and Furious investigation ended not with concessions from DOJ and voluntary disclosure, but rather with protracted and costly litigation. The House voted to hold the attorney general in contempt of Congress. However, unlike in the confidential informants investigation, this threat and fulfillment of a contempt vote did nothing to deter DOJ from continuing to withhold documents or move the conflict closer to resolution. Ultimately, not only did the Committee on Oversight and Government Reform have to wait nearly three and a half years for an order instructing DOJ to produce withheld documents, but it must also now contend with an adverse ruling on the application of the deliberative process privilege.

While the confidential informants investigation was successful in asserting Congress's investigatory powers, it is less clear if the investigation had a lasting, positive impact on the FBI policies and behavior it examined. The attorney general has had policies on the books regarding the handling of confidential informants since 1976, following congressional hearings and public scrutiny of the FBI's use of domestic surveillance in the prior decades.[83] These policies were overhauled in 2001 and 2002, in part due to the revelations of misconduct that were the subject of the congressional investigation.[84] These reforms included greater involvement of DOJ prosecutors in deciding whether to register and retain high-risk informants and the creation of a Criminal Informant Review Committee.[85]

Despite these seemingly positive reforms, compliance with the revised attorney general guidelines did not manifest quickly. A 2005 study conducted by the DOJ Office of the Inspector General (OIG) found deficiencies in nearly every level of implementation of the guidelines. The FBI's process for implementing the revised guidelines was "not optimal" and included "inadequate interdivision planning, coordination, and direction."[86] The OIG determined that 87 percent of confidential informant case files it examined evidenced at least one violation of the attorney general guidelines, and field supervisors were frequently not held accountable for such compliance violations.[87] Finally, the OIG "found serious shortcomings in the supervision and administration of the Criminal Informant Program,"[88] which was not adequately supported by FBI headquarters.[89]

In 2006, DOJ created a set of policies on confidential informants that applies to the FBI specifically.[90] These guidelines were reportedly motivated by "an FBI effort to enhance consistency in the use of informants across locations and investigative programs and better align the management of informants with its mission."[91] The new guidelines differed only in minor ways from the attorney general guidelines, relating to the vetting of informants and oversight of informants'

82. *See 2 New England Hearings*, *supra* note 45, at 161, 660 ("So right now we are having our legal staff prepare a contempt citation on this issue. I don't really want to do that and I have told the Justice Department this time and again but if they continue to be recalcitrant and we cannot get cooperation from them to get these documents, I hope everyone on this committee will assist me in getting the support we need in the Congress to move this forward.") (statement of Chairman Dan Burton).

83. U.S. Gov't Accountability Off., GAO-15-807, Confidential Informants: Updates to Policy and Additional Guidance Would Improve Oversight by DOJ and DHS Agencies 2 (2015).

84. U.S. Dep't of Justice, Dep't of Justice Guidelines Regarding the Use of Confidential Informants 135-36 (2001); 2005 OIG Report, *supra* note 2, at 63; Alexandra Natapoff, Snitching: Criminal Informants and the Erosion of American Justice 142 (2009).

85. 2005 OIG Report, *supra* note 2, at 83.

86. *Id.* at 4.

87. *Id.* at 2, 4.

88. *Id.* at 8.

89. *Id.* at 3, 8.

90. U.S. Dep't of Justice, Attorney General's Guidelines Regarding the Use of FBI Confidential Human Sources (2006).

91. U.S. Gov't Accountability Off., *supra* note 83, at 2.

illegal activities.[92] Other DOJ subagencies continue to be bound by the attorney general guidelines. Agencies have had varying degrees of success in complying with the requirements. A 2015 study by the DOJ OIG found that the Drug Enforcement Administration's (DEA) confidential informant policies deviated from the attorney general guidelines in significant ways.[93] For example, DEA did not require agents to address specific risk assessment factors as required by the attorney general guidelines when writing an initial suitability assessment, a preliminary step in establishing a confidential informant.[94] A Government Accountability Office report published several months later discussed similar concerns with DEA compliance.[95]

Several of these deficiencies speak directly to the concerns motivating the committee's investigation: the dangers of developing high-risk confidential informants and the oversight needed to prevent informants from freely committing crimes with the tacit approval of law enforcement. These enduring deficiencies may speak to the need for and importance of consistent and continuing congressional oversight.

92. *Id.*

93. Off. of the Inspector General, U.S. Dep't of Justice., Audit of the Drug Enforcement Administration's Confidential Source Policies and Oversight of Higher-Risk Confidential Sources ii (2005), https://oig.justice.gov/reports/2015/a1528.pdf.

94. Off. of the Inspector General, U.S. Dep't of Justice, Executive Summary: The Drug Enforcement Administration's Payments to Confidential Sources.

95. U.S. Gov't Accountability Off., *supra* note 83, at 11-9.